Filed 11/26/12 P. v. Villafan CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID OSCAR VILLAFAN,

Defendant and Appellant.

F062841 & F062842

(Super. Ct. Nos. SUF30402A & AF46863A)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Donald J. Proietti, Judge.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Brook Bennigson, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

In March of 2011, appellant David Oscar Villafan was convicted after jury trial of being a felon in possession of a firearm, carrying a concealed weapon in a vehicle and carrying a loaded firearm on his person or in a vehicle. (Pen. Code, §§ 12021, subd. (a)(1), 12025, subd. (a)(1), 12031, subd. (a)(1).) Appellant admitted a prior strike conviction. (§§ 1170.12, subd. (c)(1), 667, subd. (a)(1).) In a prior jury trial that occurred in January 2011, appellant was acquitted of two counts of robbery. (§ 211.) In a separate case, the court found that appellant violated his probation. He was sentenced to an aggregate term of 11 years 8 months imprisonment. The court imposed separate punishment for each firearm offense.

Appellant argues the trial court erred by finding that a witness was unavailable to testify. Also, he contends that Penal Code section 654 precludes imposition of punishment for all of the firearm counts and that he is entitled to additional presentence conduct credits. Finally, appellant argues that defense counsel was ineffective. Following and applying the California Supreme Court's recent decision in *People v. Jones* (2012) 54 Cal.4th 350 (*Jones*), we conclude that appellant can only be punished once for his act of possessing a loaded firearm. The rest of appellant's claims are not convincing. We will modify appellant's sentence and, as modified, affirm the judgments.

PROCEDURAL FACTS

A. Case No. AF46863A.

On January 4, 2008, appellant was charged in a five-count information with two counts of robbery, being a felon in possession of a firearm, carrying a concealed weapon in a vehicle and carrying a loaded firearm on his person or in a vehicle. It was alleged in connection with the robbery counts that appellant personally used a firearm during the commission of the offense and that he suffered a prior serious felony conviction. It was alleged in connection with every count that appellant suffered a prior strike conviction.

Appellant pled not guilty and denied the special allegations.

On July 8, 2008, jury trial commenced (the trial). On July 11, 2008, appellant was convicted of all counts and the firearm use allegations were found to be true. The court found the prior conviction allegations to be true.

On November 2, 2010, the court granted appellant's motion for a new trial based on denial of his right to a speedy trial.

The first retrial began on January 25, 2011. On January 28, 2011, the jury returned not guilty verdicts on the two robbery counts. It was unable to reach a verdict on the remaining counts and a mistrial was declared.

The second retrial began on March 29, 2011, on the firearm charges, which were renumbered as counts 1, 2 and 3. It was stipulated that appellant was convicted of a felony in April 2007. The defense did not call any witnesses or present any evidence. On April 4, 2011, the jury found appellant guilty of being a felon in possession of a firearm (count 1), carrying a concealed weapon in a vehicle (count 2), and carrying a loaded firearm on his person or in a vehicle (count 3). Appellant admitted the prior strike conviction.

B. Case No. SUF30402A.

On April 5, 2007, appellant pled no contest to one count of assault with a deadly weapon. He admitted that the crime was a serious felony and was committed for the benefit of a criminal street gang. He was placed on probation for five years.

On October 19, 2007, it was alleged that appellant violated the terms of his probation by failing to obey all laws in that he committed the following crimes: assault with a firearm, participating in a criminal conspiracy, committing a crime for the benefit of a criminal street gang, using a firearm during the commission of an offense, committing a robbery, carrying a concealed firearm in a vehicle, and carrying a concealed weapon while being an active participant in a criminal street gang. It was alleged that appellant suffered a prior serious felony conviction.

The probation violation hearing was held in conjunction with the jury trial in case No. AF46863A. On July 11, 2008, the court found that appellant violated his probation by committing two robberies, personally using a firearm, and unlawfully carrying a concealed weapon in a vehicle.

Appellant's request for a new hearing was heard on January 12, 2011. Defense counsel stated that the attorney of record for the probation revocation case had not been present at the probation revocation hearing. The prosecutor did not oppose the request for a new hearing. The court set aside the probation violation finding.

The second probation violation hearing was conducted on January 28, 2011, after the conclusion of the first retrial. Defense counsel submitted the matter without presentation of evidence or argument. The court found that appellant violated his probation by committing an assault with a firearm, personally using a firearm, committing robbery and carrying a concealed weapon in a vehicle. It found the rest of the allegations not true.

C. Sentencing on both cases.

On May 25, 2011, appellant was sentenced on both cases. In case No. SUF30402A the court terminated appellant's probation and sentenced appellant to an aggregate term of nine years' imprisonment. He was awarded 2,202 custody credits, applied to case No. AF46863A. In case No. AF46863A appellant was sentenced to 16 months on count 1, a consecutive term of 16 months on count 3, and a concurrent term of 16 months on count 2.

FACTUAL CIRCUMSTANCES OF THE CRIMES BASED ON EVIDENCE ADMITTED AT SECOND RETRIAL

On October 15, 2007, appellant pointed a firearm at Pedro Gonzalez and "racked" the weapon. Gonzalez saw appellant get into a Blue Chevrolet pickup truck. Gonzalez called emergency services (911). Gonzalez told the dispatcher that a police patrol car was following the truck.

The dispatcher determined that Atwater Police Officer Daniel Fairchild was driving the patrol car that was following the truck. Officer Fairchild was in that area investigating an incident involving a pickup truck with a "49er" sticker on the back window. Officer Fairchild saw a truck matching this description leaving an apartment complex and began to follow it. Then he received a dispatch that the occupants of the truck had been involved in an altercation.

A felony stop of the truck was conducted by Officer Fairchild and other police officers. Appellant was sitting in the front passenger seat; Jose Guadalupe Comparon was the driver. A loaded, cocked Astra nine-millimeter semi-automatic firearm was found under the front passenger seat.[1]

It was stipulated that the gun belonged to Jose Calderon. It was also stipulated that appellant previously was convicted of a felony.

DISCUSSION

I. The Court Correctly Determined That Gonzalez Was An Unavailable Witness.

A. Facts.

1. Gonzalez's testimony at the first trial.

On May 14, 2008, a chambers discussion was held concerning trial scheduling in light of efforts that the prosecutor was making to bring unnamed witnesses who lived in Mexico to the United States. The contents of the discussion were set forth on the record. The prosecutor explained that the witnesses had been located and they were willing to come to the United States to testify.[2] The prosecutor explained the process that he was

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[1] A latent print analyst examined the gun and magazine but found only fragmentary latent impressions that did not have any comparison value.

[2] The prosecutor did not identify the anticipated witnesses. It is apparent from subsequent events that one of the witnesses was Gonzalez. The identity of the other witness is not clear from the appellate record. Gonzalez was the only witness for the

required to follow to gain their entry in the United States: "The process we have to go through with Homeland Security is a thing called significant parole. We can get that locally, San Ysidro border, for two weeks. They can be in the country for two weeks. They can authorize it locally. Otherwise, we have to go through Washington D.C. and it will be a significant delay …." The prosecutor also stated: "And it is a significant expense to the People to bring these witnesses. There's been various quotes, but it's about two thousand dollars each." It was decided that this case would be "trailed week-to-week."

Gonzalez testified that on October 15, 2007, he and a companion named Nicolas Perez drove from a grocery store to his apartment. Appellant and Comparon, who was one of Gonzalez's uncles, followed them in a pickup truck. They parked next to Gonzalez. Appellant and Comparon got out of the truck. Appellant pointed a gun at Gonzalez, racked the slide, and demanded Gonzalez's wallet. Gonzalez gave appellant his wallet. Then appellant demanded Perez's wallet and Perez gave it to him. Officer Fairchild testified that he found two men's wallets in the truck between the front driver's seat and the front passenger's seat. Appellant and Comparon got into the truck and drove away. Gonzalez saw a police car follow the truck. Gonzalez dialed 911. Gonzalez testified that he did not owe appellant any money. However, appellant blamed Gonzalez's brother, Martin Gonzalez (Martin), "for getting one of his trucks impounded."[3] Appellant "tried to get money from" Martin on October 14, 2007.

People at the first trial who was not a law enforcement officer. Nicolas Perez did not testify. Comparon invoked his privilege against self-incrimination and refused to testify. "The Court [took] up the matter of the defendant's sister[']s possible testimony. Arguments [were] heard and Defense request [was] denied."

[3] Solely to avoid confusion, this witness will be referenced by his first name. No disrespect is intended or implied by the informality.

Gonzalez testified that the gun that was seized from the truck looked like the gun that appellant pointed at him.

2. The Evidence Code[4] section 402 hearing during the first retrial and reading of Gonzalez's testimony from the trial.

On January 20, 2011, the court stated that the prosecutor "has made a motion … under [Evidence] Code Section 402 regarding the unavailability of a witness [named] Pedro Gonzale[z] and the request to read trial transcript testimony or former testimony into evidence …." A hearing was conducted to determine whether Gonzalez was unavailable to testify at the first retrial.

Merced County District Attorney's Office Investigator Anna Hazel testified that in 2008 she was assigned to locate Gonzalez pursuant to a subpoena that was issued for his testimony in the first trial. With the assistance of Al Martinez, an agent with the California Department of Justice's Foreign Prosecution Unit, she was able to locate Gonzalez, who was living in the Mexican state of Michoacan. Hazel testified that Gonzalez was cooperative and agreed to testify. Hazel testified that she contacted the Immigrations and Customs Enforcement Unit of Department of Homeland Security to obtain a "parole pardon" so Gonzalez could enter the United States to testify in this case. Hazel testified that in May 2008 a "parole was granted" so Gonzalez could enter the United States in July 2008.

Hazel testified that in November of 2010 she was asked to locate Gonzalez for the retrial. She contacted Atwater Police Department Detective Adolfo Lomeli, who told her that Gonzalez's uncle, Juan Orozco-Gonzalez, still lived in Atwater. Hazel contacted Orozco-Gonzalez, who told her that Gonzalez was still living in Mexico. Orozco-Gonzalez agreed to contact family members to see if someone could get in touch with

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4 All further statutory references are to the Evidence Code unless otherwise indicated.

Gonzalez. Hazel testified that Orozco-Gonzalez subsequently told her that Gonzalez "refused to cooperate" and "did not wish to come to the United States for this purpose." Hazel also testified that Orozco-Gonzalez told her that Gonzalez "did not want to be contacted by the district attorney's office." Hazel also testified that she did not ask the Foreign Prosecution Unit of the Department of Justice to locate Gonzalez for the retrial because the agent she worked with in 2008 had retired and his replacement told her that "they are no longer in the business of assisting local municipalities in locating individuals in Mexico [¶]…[¶] for purposes of serving subpoenas."

Daryl Davis, another investigator with the Merced County District Attorney's Office, testified that in July 2008 he escorted Gonzalez to the Tijuana border crossing and saw him cross into Mexico.

Detective Lomeli testified that he attempted to contact Gonzalez for the past three or four weeks without success. On the morning of the hearing he spoke with Gonzalez's sister, who lives in the Mexican state of Michoacan. Gonzalez's sister said that she did not think Gonzalez wanted to come to the trial. Detective Lomeli also spoke with Orozco-Gonzales, who said that Gonzalez told him that he did not want to come to the United States to testify.

Gonzalez's brother Martin testified that Gonzalez lived in Michoacan and had not been in the Merced area since July of 2008.[5] Martin testified that he spoke with Gonzalez on the Sunday before the hearing. Gonzalez said that he was not willing to come to the United States to testify. Martin said that he had not given Gonzalez's address or phone number to a member of law enforcement.

Defense counsel argued that the prosecution had not made a sufficient "showing of due diligence." After argument, the court found Gonzalez was an unavailable witness.

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[5] There is no evidence in the appellate record about the circumstances surrounding Gonzalez's emigration from the United States in 2008.

The evidence showed that Gonzalez "is out of the United States, he is unavailable for purposes of court process." It also found the prosecutor had exercised due diligence.

Gonzalez's testimony was read to the jury in the first retrial.

3. Evidence Code section 402 hearing during the second retrial and stipulation concerning Gonzalez's testimony from the trial.

On March 29, 2011, the second retrial commenced. The prosecutor requested a section 402 hearing to determine if Gonzalez was still unavailable. The parties stipulated that the court could consider testimony elicited at the section 402 hearing that was held during the first retrial.

Martin testified that Gonzalez still lived in Mexico. The prosecutor asked, "And where is he today?" Martin replied, "In Mexico." Martin testified that he last spoke with Gonzalez on the telephone two weeks ago; Gonzalez was in Mexico on that date. During the past two months, no one from any law enforcement agency asked him for Gonzalez's address or telephone number.

Defense counsel argued against unavailability, as follows:

> "… I guess the problem I have with the Court making a finding of unavailability at this time is, that clearly I think the evidence would suggest he's out of the jurisdiction, but I don't think that relieves the prosecution of doing -- it would be my position that that does not relieve the prosecution of doing anything to try to secure the witness for this hearing. Essentially, they're relying on what happened before the last trial to try to secure him. They know where he is or it can easily be determined and they've made no effort to see if he would even be willing to come back to testify. It would be our position that that's insufficient, and I'll submit it."

The court found that Gonzalez was "out of the country" and "the Court [was] unable to compel his or her attendance by process." It also found "that prior to and up to January 2011, the People did exercise reasonable diligence in trying to secure attendance. And that in the short period of time that has elapsed, that it would be futile to continue to attempt to secure the testimony of a witness who has made it very clear he does not want

to come back and participate. So, I'll find that Mr. Pedro Gonzalez is unavailable for purposes of this trial."

Instead of reading Gonzalez's testimony from the first trial into the record, the following stipulation was read to the jury:

> "… Mr. Pedro Gonzalez is unavailable. Mr. Gonzalez testified in a previous hearing July 9th, 2008. At the hearing, the witness testified that on October 15th, 2007, the defendant pointed a firearm at him and it looked like the firearm in Exhibit 109. The defendant racked the firearm. The firearm touched the witness's sweater. Mr. Gonzalez observed the defendant get into a blue Chevrolet pickup. It looked like the one depicted in Exhibits 102 and 103. And the witness then immediately called 911 from his residence … in Atwater and notified the Atwater Police. [¶] And it's stipulated that if he were called to testify today, that that would be his testimony."

B. Appellant's challenges to the trial court's determination that Gonzalez was an unavailable witness fail.

Appellant argues that the trial court's determination that Gonzalez was an unavailable witness violated his federal and state constitutional confrontation rights (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) and was erroneous under California state law. He asserts that under constitutional requirements and California state law, the proponent of former testimony by an unavailable witness bears the burden of proving that he or she made a good faith effort or exercised reasonable diligence to obtain the presence of the witness at trial. Based on this premise, appellant contends that the trial court erred by finding Gonzalez was unavailable because the prosecutor "failed to discharge its burden of showing reasonable diligence to procure his attendance at trial."

Respondent argues that appellant forfeited the constitutional claim by failing to object on confrontation clause grounds below. Respondent also argues that the statutory

requirements of section 240, subdivision (a)(4) were satisfied and they do not require proof of reasonable diligence.[6] We agree with respondent.

As will be explained, appellant did not interpose a confrontation clause objection below. Consequently, his challenge to the constitutionality of admitting evidence of Gonzalez's prior testimony was not preserved for appellate review. Under California state law, the trial court properly determined that Gonzalez was unavailable pursuant to section 240, subdivision (a)(4) because Gonzalez was in Mexico and the court was unable to compel his "attendance by its process." (§ 240, subd. (a)(4); *People v. Herrera* (2010) 49 Cal.4th 613, 622 (*Herrera*).) Section 240, subdivision (a)(4) does not contain a reasonable diligence requirement. (*Herrera, supra,* at pp. 622-623.)

1. Legal standard.

The confrontation clauses of the federal and state Constitutions guarantee criminal defendants the right to confront witnesses against them. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) "Although important, the constitutional right of confrontation is not absolute. [Citations.] 'Traditionally, there has been "an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant [and] which was subject to cross-examination …." [Citation.]' [Citation.]" (*Herrera, supra,* 49 Cal.4th at p. 621.) "A witness who is absent from a trial is not 'unavailable' in the constitutional sense unless the prosecution has made a 'good faith effort' to obtain the witness's presence at the trial." (*Id*. at p. 622.)

"This traditional exception is codified in the California Evidence Code." (*Herrera, supra,* 49 Cal.4th at p. 621, fn. omitted.) Section 240, subdivision (a)(4) provides that a witness is unavailable if he or she is "[a]bsent from the hearing and the

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6 Appellant did not respond to either of these arguments in his reply brief.

court is unable to compel his or her attendance by its process." Section 1291, subdivision (a)(2) provides that former testimony is not made inadmissible by the hearsay rule if "the declarant is unavailable as a witness," and "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given has the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (§ 1291, subd. (a)(2).) "[W]hen the requirements of [Evidence Code] section 1291 are met, the admission of former testimony in evidence does not violate a defendant's constitutional right of confrontation." (*Herrera, supra,* 49 Cal.4th at p. 621.)

When examining a trial court's finding of unavailability, the appellate court "review[s] the trial court's resolution of disputed factual issues under the deferential substantial evidence standard [citation], and independently review whether the facts demonstrate prosecutorial good faith and due diligence [citation]." (*Herrera, supra,* 49 Cal.4th at p. 623.)

2. The constitutional claim was forfeited.

"'No procedural principle is more familiar to [the United States Supreme Court] than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' [Citation.]" (*United States v. Olano* (1993) 507 U.S. 725, 731.)

This principle is codified in the California Evidence Code:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
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> "(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (§ 353, subd. (a).)

"Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence. [Citations.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 853-854.)

The contemporaneous objection rule applies to claims of state and federal constitutional error. (*People v. Daniels* (2009) 176 Cal.App.4th 304, 320, fn. 10.) A claim that the introduction of evidence violated the defendant's rights under the confrontation clause must be presented to the trial court for decision or it is forfeited on appeal. (*People v. Lewis and Oliver (*2006) 39 Cal.4th 970, 1028, fn. 19; *People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14; *People v. Chaney* (2007) 148 Cal.App.4th 772, 777-780.)

In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, the United States Supreme Court wrote, "The defendant *always* has the burden of raising his Confrontation Clause objection …." (*Id*. at p. 327.) Also, "The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections." (*Id*. at 314, fn. 3.)[7]

Here, the record shows that appellant did not raise a constitutional objection during the section 402 hearings on the prosecutor's motions at the first and second retrials to declare Gonzalez an unavailable witness and admit his prior testimony. Also, appellant did not raise a confrontation clause objection before Gonzalez's testimony was read into the record at the first retrial or before he entered into a stipulation concerning

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[7] "Over the years, cases have used the word [waiver] loosely to describe two related, but distinct, concepts: (1) losing a right by failing to assert it, more precisely called forfeiture; and (2) intentionally relinquishing a known right. '[T]he terms "waiver" and "forfeiture" have long been used interchangeably. The United States Supreme Court recently observed, however: "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' [Citations.]" [Citation.]' [Citation.]" (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.)

the contents of Gonzalez's prior testimony at the second retrial. At no point in time did appellant argue that introduction of evidence about Gonzalez's prior testimony violated his rights under the confrontation clauses contained in the federal and state constitutions. Therefore, appellant's constitutional challenge to the adequacy of the evidence supporting the trial court's finding that the prosecutor exercised reasonable diligence was not preserved for appellate review. (*People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 1028, fn. 19; *People v. Burgener, supra,* 29 Cal.4th at p. 869; *People v. Catlin, supra,* 26 Cal.4th at p. 138, fn. 14.)

3. Gonzalez was an unavailable witness pursuant to Evidence Code section 240, subdivision (a)(4).

We turn to the question whether the trial court erred under California state law when it found Gonzalez was an unavailable witness. Respondent correctly recognizes that section 240, subdivision (a)(4) is the applicable statute in this case because the evidence proved that Gonzalez was living in Mexico in 2011. As previously set forth, section 240, subdivision (a)(4) provides that a witness is unavailable if he or she is "[a]bsent from the hearing and the court is unable to compel his or her attendance by its process." Although the trial court generally referenced section 240, it made the determinations necessary to support unavailability under subdivision (a)(4) of section 240 when it found that Gonzalez was "out of the country" and "the Court [was] unable to compel [Gonzalez's] attendance by process."

Appellant errs by citing both subdivisions (a)(4) and (a)(5) of section 240[8] and treating the two subdivisions as indistinguishable. It is subdivision (a)(4) of section 240 that applies when the evidence proves that the witness is outside the reach of the court's

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[8] Section 240, subdivision (a)(5) provides that a witness is unavailable if the declarant is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process."

process. There is an important difference between subdivisions (a)(4) and (a)(5) of section 240. Unavailability pursuant to section 240, subdivision (a)(5) requires a showing of reasonable diligence. In contrast, unavailability under subdivision (a)(4) of section 240 does not require a showing of reasonable diligence. In *Herrera*, our Supreme Court explained: "In contrast to section 240(a)(5), section 240(a)(4) makes no mention of a 'reasonable diligence' requirement, thus indicating the Legislature's intent to dispense with such a showing in those cases where the court has no power to compel the witness's attendance." (*Herrera, supra*, 49 Cal.4th at pp. 622-623.)

Since appellant forfeited the confrontation clause claim and section 240, subdivision (a)(4) does not contain a reasonable diligence requirement, we reject all of appellant's arguments concerning the adequacy of the prosecutor's showing of reasonable diligence.[9]

We turn to an assessment of the evidence supporting the findings that Gonzalez was unavailable because he was outside the reach of the court's process. The court found that Gonzalez was "out of the country" and "the Court [was] unable to compel [Gonzalez's] attendance by process." These findings are supported by substantial

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9 In any event, the People exercised reasonable diligence and appellant's arguments to the contrary are unpersuasive. "'The law requires only reasonable efforts, not prescient perfection.' [Citation.]" (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706.) A finding of unavailability will not be reversed "'simply because the defendant can conceive of some further step or avenue left unexplored by the prosecution.'" (*Ibid.*) The prosecutor did not procure Gonzalez's unavailability by assisting in his removal from the country. The prosecution did not deport Gonzalez or nefariously make him unavailable. Gonzalez was permitted to enter the country for a two-week period on a "parole pardon." Once his testimony was complete, Gonzalez was escorted to the Tijuana border. The prosecutor did not have the legal right or ability to detain Gonzalez in the United States for an extended period of time after expiration of the two-week period of his parole pardon. In addition, the prosecutor was not obligated to attempt to obtain Gonzalez's presence at the second retrial through use of a mutual assistance treaty because, inter alia, all of the evidence showed that Gonzalez did not want to return to the United States to testify.

evidence. There was ample testimony proving that Gonzalez lived in Mexico at the time of the first retrial and second retrial. During the section 402 hearing at the first retrial, there was evidence presented that both Gonzalez's sister and his uncle said Gonzalez lived in Mexico. During the section 402 hearing at the second retrial Gonzalez's brother, Martin, testified that Gonzalez still lived in Mexico. The prosecutor asked, "And where is he today?" Martin replied, "In Mexico."

The evidence supports the trial court's finding that Gonzalez was living in Mexico and was outside of the court's ability to compel attendance by process. The requirements of section 240, subdivision (a)(4) were satisfied. Consequently, we uphold the ruling that Gonzalez was an unavailable witness and admission of the stipulation concerning Gonzalez's former testimony at the second retrial.

II. The Sentences Imposed For Counts 2 And 3 Must Be Stayed.

A. Facts.

During the sentencing hearing, defense counsel argued: "[T]his was an incident where the defendant had one gun on one occasion. He's charged with three separate offenses, which can be charged under the Penal Code, but for sentencing purposes we believe they should run concurrent because it really was one event, one gun possessed by my client all at the same time."

The prosecutor argued: "I believe that it would be appropriate for the Court to run [count 2] and [count 3] concurrent because they are very close, whether one is loaded or not loaded. However, [count 1] and [count 2] should be run consecutive."

The court imposed the aggravated and subordinate term of eight months, doubled, for count 1. It imposed the same sentence for count 3, and ordered this term to run consecutively because appellant committed "what the Court determines to be a new crime while on probation" that was "separate from the charge that he was in felony possession of a firearm." The court imposed the aggravated and subordinate term of eight months, doubled, for count 2 and ordered the sentence to "run concurrent as a subordinate term."

B. Penal Code section 654 claims may be raised for the first time on appeal.

"As relevant, section 654, subdivision (a), provides: 'An act or omission that is publishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.'" (*Jones, supra,* 54 Cal.4th at p. 353.)

During the sentencing hearing, appellant argued that Penal Code section 654 required the sentences imposed for counts 1, 2 and 3 to run concurrently. On appeal, he argues that this same statute requires the sentences on those counts to be stayed. Although appellant raised a different sentencing claim below than is presented to this court, the forfeiture rule does not bar consideration of this type of sentencing challenge for the first time on appeal. "'Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as errors on appeal." (*People v. Hester* (2000) 22 Cal.4th 290, 295.) Yet, "on direct appeal the reviewing court is confined to the record. We cannot remand a case to the trial court for the purpose of trying an issue raised for the first time on appeal." (*People v. Sparks* (1967) 257 Cal.App.2d 306, 311.)

C. Imposition of a concurrent sentence on count 2 does not preclude a Penal Code section 654 challenge.

The trial court's imposition of a concurrent sentence for count 2 does not preclude a Penal Code section 654 challenge on appeal. *Jones, supra,* 54 Cal.4th 350 explained: "'It has long been established that the imposition of concurrent sentences is precluded by section 654 [citations] because the defendant is deemed to be subjected to the term of *both* sentences although they are served simultaneously.' [Citation.] Instead, the accepted 'procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable.' [Citations.]" (*Jones, supra,* at p. 353.) Thus, "although there appears to be little practical difference

between imposing concurrent sentences, as the trial court did, and staying sentence on two of the convictions, as defendant urges, the law is settled that the sentences must be stayed to the extent that section 654 prohibits multiple punishment." (*Ibid.*)

D. The sentences on counts 2 and 3 must be stayed.

We turn to substantive consideration of appellant's sentencing challenge. He argues that Penal Code section 654 required the trial court to stay the sentence on two of the three illegal firearm possession convictions because the court has erroneously punished him three times for the single act of possessing the loaded handgun that was found on the truck's floor boards underneath the front passenger seat. As we will explain, *Jones, supra*, 54 Cal.4th 350 is directly on point. In *Jones*, our Supreme Court held that punishment may be imposed only once for a single act of firearm possession. Following and applying *Jones*, we conclude that the trial court erred in imposing separate punishment on counts 2 and 3.

Penal Code section 654 has been interpreted to prohibit multiple punishments for a single act or an indivisible course of conduct. "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) Whether a course of conduct is indivisible depends on a defendant's intent and objective, not temporal proximity of the offenses. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.)

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

After briefing was complete, our Supreme Court decided *Jones, supra*, 54 Cal.4th 350. In *Jones,* police officers searched the car that the defendant was driving and found a loaded .38-caliber revolver that was not registered to him. He told the officers that he bought the gun three days earlier for protection. The defendant was convicted of possessing a firearm by a felon, carrying a readily accessible concealed and unregistered firearm and carrying an unregistered firearm in public. He was separately sentenced for each offense. Cutting through the Gordian knot of conflicting appellate authority, *Jones* held "that a single possession or carrying of a single firearm on a single occasion may be punished only once under section 654." (*Id*. at p. 357.) It further concluded that "[s]ection 654 prohibits multiple punishment for a single physical act that violates different provisions of law." (*Id*. at p. 358.)

Jones, supra, 54 Cal.4th 350 cited *People v. Lopez* (2004) 119 Cal.App.4th 132 (*Lopez*), on which appellant relies. In *Lopez*, the defendant unlawfully possessed a loaded handgun. The appellate court concluded that Penal Code section 654 proscribed imposition of punishment for both unlawful possession of a firearm and unlawful possession of ammunition. It reasoned, "Where, as here, all of the ammunition is loaded into the firearm, an 'indivisible course of conduct' is present and section 654 precludes multiple punishment." (*Lopez, supra,* at p. 138.)

Appellant fits squarely within the factual and legal rubric presented in *Jones, supra,* 54 Cal.4th 350 and *Lopez, supra*, 119 Cal.App.4th 132. Appellant possessed a

single loaded firearm. His conduct in possessing, carrying and concealing this gun was a "single physical act," as occurred in *Jones* and *Lopez*. Therefore, Penal Code section 654 operates to prohibit imposition of separate punishment for counts 2 and 3. The proper remedy is for this court to stay the sentences that were imposed for these counts. (*Lopez, supra,* 119 Cal.App.4th at p. 139.)[10]

III. Appellant Is Not Entitled To Additional Presentence Credits.

Appellant was awarded 2,202 custody credits, which were applied to case No. AF46863A. He argues that he is entitled to additional presentence conduct credits based on the October 1, 2011, amendment of Penal Code section 4019. In appellant's view, the amendment to Penal Code section 4019 which provides one-for-one credit for defendants who serve presentence time in, inter alia, county jail (Pen. Code, § 4019, subds. (b), (c), (f)), must be applied retroactively to defendants who committed the crimes before October 1, 2011, based on equal protection principles.

We rejected this exact argument in *People v. Ellis* (2012) 207 Cal.App.4th 1546 (*Ellis*). *Ellis* held that "the October 1, 2011, amendment [of section 4019] does not apply retroactively as a matter of statutory construction." (*Id*. at p. 1550.) Relying on *People v. Brown* (2012) 54 Cal.4th 314, in which our Supreme Court held that prospective only application of the 2010 amendment of Penal Code section 4019 did not violate equal protection principles, *Ellis* reached the same conclusion with respect to the October 1, 2011, amendment of Penal Code section 4019. Following and applying *Ellis*, "we reject [appellant's] claim that he is entitled to earn credits at the enhanced rate provided by current section 4019 for the entire period of his presentence incarceration." (*Ellis, supra,* at p. 1552.)

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[10] This holding renders appellant's argument that "[t]he trial court erred by imposing a consecutive term for count [three] rather than a concurrent term" moot.

IV. Defense Counsel Was Not Ineffective.

Appellant contends that defense counsel was ineffective because he did not argue that the doctrine of collateral estoppel precluded retrial on the firearm charges after the jury at the first retrial found him not guilty of robbery. We reject this contention because the underlying collateral estoppel argument is not convincing. Defense counsel did not have an obligation to advance meritless legal arguments.

A. Facts.

The criminal complaint in case No. AF46863A was filed on October 18, 2007, and appellant was arraigned on the same day.

The information was filed on January 4, 2008. Appellant was arraigned on the information on January 7, 2008.

On July 9, 2008, the jury was sworn on appellant's first trial.

On June 21, 2010, appellant filed a motion to dismiss or alternately for a new trial on the ground that his right to speedy trial had been violated.

The minutes of a hearing on November 2, 2010, state that the prosecutor stipulated to a new trial. The dismissal motion was denied.

The first retrial commenced on January 25, 2011. The jury found appellant not guilty of the robbery counts. It could not reach a verdict on the firearm counts and a mistrial was declared.

The second retrial began on March 29, 2011. Guilty verdicts were returned on the firearm counts.

B. Legal standard.

The law governing direct review of ineffective assistance claims is undisputed:

> "… First, a defendant must show his or her counsel's performance was 'deficient' because counsel's 'representation fell below an objective standard of reasonableness [¶] ... under prevailing professional norms.' [Citations.] Second, he or she must then show prejudice flowing from counsel's act or omission. [Citations.] We will find prejudice when a

> defendant demonstrates a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.] 'Finally, it must also be shown that the [act or] omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make.' [Citation.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 610-611.)

Reviewing courts will reverse on the ground of inadequate counsel only if the appellate record affirmatively establishes counsel did not have a reasonable tactical purpose for the challenged act or omission. (*People v. Zapien* (1993) 4 Cal.4th 929, 980.) The standard for judging counsel's representation is extraordinarily deferential. The appellant bears the burden of overcoming strong presumptions that counsel's conduct fell within the wide range of reasonable professional assistance and that the challenged act or omission might be considered sound trial strategy. (*Strickland v. Washington* (1984) 466 U.S. 668, 689; *People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

The failure to object is considered a matter of trial tactics "as to which we will not exercise judicial hindsight. [Citation.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) The absence of objection " ' "rarely establishes ineffectiveness of counsel" [citation].' [Citation.]" (*People v. Gurule, supra,* 28 Cal.4th at pp. 609-610.) Counsel does not have a duty to make futile or frivolous objections. (*People v. Memro* (1995) 11 Cal.4th 786, 834.)

C. Neither deficient performance nor prejudice was established because appellant's collateral estoppel argument lacks merit.

"In criminal cases, the doctrine of collateral estoppel is derived from the double jeopardy clause in the Fifth Amendment." (*In re Cruz* (2003) 104 Cal.App.4th 1339, 1344.) Collateral estoppel is an aspect of the doctrine of res judicata and it operates in a subsequent lawsuit based on a different cause of action as a conclusive adjudication of issues that were actually litigated and determined in a prior lawsuit. (*People v. Barragan* (2004) 32 Cal.4th 236, 252.)

> "'The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]' [Citation.]" (*People v. Barragan, supra,* 32 Cal.4th at p. 253.)

Appellant argues that the jury's not guilty verdict on the robbery charges in the first retrial conclusively established that he did not possess the gun that was subsequently found in the truck. We are not convinced.

The jury's not guilty verdict on the robberies did not have a preclusive effect on whether appellant subsequently possessed a firearm in the truck. Appellant was charged on the firearm offenses based on the gun that was found in the truck underneath the passenger seat where he was sitting. The robbery offenses were based on appellant's confrontation with Gonzalez and Perez in the parking lot. All that can be determined from the jury's not guilty verdicts on the robbery counts is that it found at least one element of the crime of robbery not true beyond a reasonable doubt. The jury deadlocked on the firearm possession charges, which affirmatively proves that the jury did not base the not guilty verdicts on the robbery charges on the presence or absence of a firearm. Since possession of a gun is not an element of the crime of robbery, the not guilty verdicts on the robbery charges do not establish that appellant did not possess a gun during the events that took place in the parking lot. The verdicts also do not establish that appellant did not subsequently possess a gun in the truck. Thus, the doctrine of collateral estoppel did not bar retrial on the firearm possession charges.

"Defense counsel does not render ineffective assistance by declining to raise meritless objections." (*People v. Ochoa* (2011) 191 Cal.App.4th 664, 674, fn. 8.) If defense counsel had raised a collateral estoppel objection it would have been denied. Consequently, appellant did not establish either deficient performance or prejudice and the ineffective assistance claim fails.

DISPOSITION

In Merced Superior Court case No. AF46863A, the sentences imposed on counts 2 and 3 are stayed. The superior court is directed to prepare an amended abstract of judgment reflecting this sentencing modification and transmit a copy of it to the parties and the California Department of Corrections and Rehabilitation. As modified, the judgments are affirmed.

_____
LEVY, Acting P.J.

WE CONCUR:

_____
POOCHIGIAN, J.

_____
FRANSON, J.